

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

VONRENTZELL V. KUBIK

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
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MICHAEL R. VONRENTZELL, APPELLANT,
V.
EMILY L. KUBIK, APPELLEE.

Filed August 28, 2012. No. A-11-1117.

Appeal from the District Court for Saunders County: ROBERT R. STEINKE, Judge.
Affirmed.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier &
Lonowski, P.C., L.L.O., for appellant.

Laura A. Lowe, P.C., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Michael R. VonRenzell appeals from an order entered by the district court for Saunders County on December 7, 2011. VonRenzell claims the district court erred in awarding primary custody of the parties' minor child, Trevor Kubik-VonRenzell, to Emily L. Kubik, the biological mother, and allowing her to remove the minor child from Nebraska. He also asserts the court erred in hyphenating the child's last name. For the reasons that follow, we affirm.

BACKGROUND

VonRenzell and Kubik are the biological parents of Trevor, born in July 2010. VonRenzell and Kubik met in high school, were both 20 years old at the time of trial, and were never married to one another. Kubik began dating her husband, Alex Kubik, in 2007, while they were in high school. Alex is a member of the U.S. Navy and is currently stationed near Seattle, Washington. Prior to their marriage, they experienced some difficulties in their relationship and

broke up on a few occasions. During one such period apart, VonRenzell and Kubik had a short relationship that resulted in the birth of Trevor. Kubik and Alex resumed their relationship in December 2009, when Kubik discovered she was pregnant and she believed at that time that Alex was the biological father. She stated it did not occur to her that VonRenzell could be the father until February 2010.

VonRenzell learned of Kubik's pregnancy when she sent him a message via Facebook. VonRenzell responded, asking if everything was "okay" and if there was anything he could do to help. In subsequent messages, Kubik told VonRenzell that it was not possible Trevor was his child and that she would be devastated if VonRenzell was the father. VonRenzell's sister saw a photograph of Trevor and informed VonRenzell that Trevor looked strikingly similar to him as a baby. At that time, in September 2010, VonRenzell requested a paternity test. Ultimately, a paternity test was performed and the results were received on November 4, 2010, establishing VonRenzell as Trevor's biological father. After receiving the results, VonRenzell asked to see Trevor, and the first visit occurred at a food court in a mall in Lincoln with Kubik, Alex, VonRenzell, and Trevor present. The visit lasted approximately 30 minutes, and no other visits were scheduled at that time.

Kubik and Alex discussed getting married when they first discovered she was pregnant so they could live together on a naval base. Marriage also entitled Kubik to other benefits, such as daycare, onbase doctors' offices, and job opportunities through the Navy. Kubik and Alex married on October 26, 2010, in Groton, Connecticut. Kubik moved to Connecticut in late December 2010.

VonRenzell filed the instant action in attempt to keep Kubik and Trevor in Nebraska. VonRenzell's application to establish paternity, custody, visitation, and other matters was filed December 23, 2010. The petition sought to establish paternity and joint custody, as well as change Trevor's last name to VonRenzell and identify VonRenzell on the birth certificate. Kubik's answer and counter-complaint, filed May 5, 2011, sought sole legal and physical custody subject to reasonable visitation time set by the court. Kubik also sought leave to continue residing with the child outside of the State of Nebraska because her husband, Alex, was in the Navy and stationed elsewhere.

VonRenzell resides with his sister and her husband in their home and pays monthly rent of \$300 plus some utilities. VonRenzell is employed by Novartis through a temporary service, earning \$11.02 per hour, and he works approximately 40 hours per week. His schedule allows him to be home when Trevor is awake. VonRenzell's sister testified that she is willing and able to help take care of Trevor if and when it is needed.

After a temporary custody hearing on May 9, 2011, a temporary order was issued which required Kubik to return Trevor to Nebraska by June 1 and required VonRenzell to pay child support of \$281 per month. Pursuant to that order, Kubik maintained primary custody of Trevor and VonRenzell had parenting time every Wednesday from 5 to 8 p.m. and every other Sunday from 9 a.m. to 5 p.m. Kubik and Trevor lived in Ashland, Nebraska, with her mother during the pendency of the temporary order.

Trial took place in Wahoo, Nebraska, on November 16, 2011. At trial, there was no dispute that VonRenzell is the biological father of Trevor and that Kubik is his mother. The

disputed issues were custody, parenting time, child support, and Kubik's request to remove Trevor to the State of Washington.

The court determined custody on the basis of the best interests of the minor child, in accordance with Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 2010), as defined in the Parenting Act, specifically Neb. Rev. Stat. § 43-2922 (Cum. Supp. 2011). The court found Trevor has been in the exclusive care and custody of his mother, Kubik, since his birth in July 2010, and the evidence shows she takes good care of him, feeds and bathes him, and provides for his medical needs. The court stated it would likely be contrary to Trevor's best interests to disrupt the emotional relationship and stability he enjoys with Kubik. Although Kubik stated she would not be opposed to a joint custody arrangement, the court found it was in Trevor's best interests to place his legal and physical custody solely with her. An order was issued by the district court for Saunders County on December 7, 2010, awarding sole legal and physical custody to Kubik, allowing her to remove Trevor to Washington to join her husband, establishing child support, and establishing visitation. The court also ordered an amendment of Trevor's birth certificate to add VonRentzell as the biological father and ordered Trevor's name to be hyphenated to "Trevor W. Kubik-VonRentzell." VonRentzell timely appealed.

ASSIGNMENTS OF ERROR

VonRentzell's assignments of error, consolidated and restated, are as follows: The district court erred when it awarded primary physical custody to Kubik and allowed her to remove Trevor from Nebraska to Washington. The district court also erred in determining the parenting plan and visitation schedule and in hyphenating Trevor's last name.

STANDARD OF REVIEW

Child custody determinations are matters initially entrusted to the discretion of the trial court and although reviewed de novo on the record, the trial court's determinations will normally be affirmed absent an abuse of discretion. *McLaughlin v. McLaughlin*, 264 Neb. 232, 267 N.W.2d 577 (2002).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters entrusted for disposition through a judicial system. *Id.*

An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. Provided, however, that where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *In re Change of Name of Slingsby*, 276 Neb. 114, 752 N.W.2d 564 (2008).

ANALYSIS

Custody.

Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determinations will normally be affirmed absent an abuse of discretion. *McLaughlin v. McLaughlin, supra*.

In such an action in which paternity has been admitted and the natural father has demonstrated a familial relationship with the child and fulfilled his parental responsibilities of support and maintenance, the fact that the child was born out of wedlock is to be disregarded and custody determined on the basis of the child's best interests. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994). See, also, *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981). In this case, though the parties were never married, paternity was admitted and VonRenzell has demonstrated a familial relationship with the child and fulfilled parental responsibilities. Therefore, issues regarding custody and visitation are determined on the basis of the child's best interests.

The court performed an analysis of the child's best interests, as defined in the Parenting Act, specifically § 43-2922. The court found that it was in Trevor's best interests to continue to reside with his mother, Kubik, as he had been in the exclusive care and custody of her since his date of birth in July 2010. A de novo review of the record reveals no abuse of discretion, and the trial court's determination on the issue of custody is affirmed.

Removal.

VonRenzell claims the district court abused its discretion when it allowed Kubik to move to Washington with Trevor.

Nebraska's removal jurisprudence does not apply to a child born out of wedlock where there has been no prior adjudication addressing child custody or parenting time. *Coleman v. Kahler*, 17 Neb. App. 518, 766 N.W.2d 142 (2009). In this case, Kubik moved from Nebraska to Connecticut in December 2010, prior to VonRenzell's filing this action. A temporary order as part of the instant action was issued in May 2011, placing temporary custody of Trevor with Kubik and requiring Kubik to return to Nebraska with Trevor until further order of the court. Kubik did so and participated in the proceedings, which resulted in Kubik's being awarded custody and the permission of the court to remove Trevor to Washington.

While neither party directly raises this issue on appeal, we deem it necessary to point out that the district court exceeded its authority when it ordered Kubik to return to Nebraska with Trevor pending further proceedings and trial of the underlying action. Again, removal of the child had occurred prior to the commencement of these proceedings, and there had not been a prior custody adjudication. In that Kubik chose to comply with the order voluntarily and does not complain about it in this appeal, we consider this to be "harmless error," but still worthy of our comment for similar situations which may arise in future cases.

Although not required to, as we recommended in our prior opinion in *Coleman v. Kahler, supra*, the lower court chose to conduct a best interests analysis for removal utilizing the factors set out previously in *Wild v. Wild*, 15 Neb. App. 717, 737 N.W.2d 882 (2007), and *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she

has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.

The trial court found Kubik's wishes to relocate to Washington with Trevor were legitimate, as they were based on the desire to join her husband while he meets his military obligations. The court then performed further analysis of the child's best interests, including a consideration of each parent's motives; the quality of life offered; emotional, physical, and developmental needs; income or employment opportunities; housing or living conditions; educational advantages; quality of relationship between the child and his parents; ties to the community and extended family; hostilities between the parties; and the impact of the move on contact between the child and the noncustodial parent. Ultimately, the court concluded Kubik produced sufficient evidence to show it would be consistent with Trevor's best interests to allow his removal to Washington with her. Upon review of the record, we find the district court did not abuse its discretion when it allowed Kubik to remove Trevor from Nebraska to Washington.

Parenting Plan and Visitation.

When determining parenting time, the court considers the best interests of the child pursuant to § 42-364.

Exhibit 17 of the trial record reflects the parenting plan agreed upon by the parties during mediation. After mediation, VonRenzell sent a list of corrections to Kubik, requesting the removal of language setting visits according to Alex's deployment, changing the hours of parenting time assigned to VonRenzell during visits to Nebraska, and changing the provision regarding Trevor's birthday. All of such changes are reflected in the parenting plan set forth in the trial court's order.

At trial, VonRenzell proposed additional changes to the agreed-upon terms in exhibits 17 and 19. VonRenzell requested that Kubik be required to transport Trevor to Nebraska for periods of 6 weeks, instead of 3 weeks. VonRenzell also proposed that during those 6-week periods, he be granted sole custody of Trevor, subject to Kubik's parenting time on Wednesdays and every other Sunday.

The court ordered the parties to comply with the mediated parenting plan set forth in exhibit 17 and modified by exhibit 19. This includes two 3-week visits to Nebraska, where Trevor will remain in the custody of Kubik, subject to parenting time with VonRenzell on Mondays, Wednesdays, Fridays, and Sundays. VonRenzell alleges it was an abuse of the trial court's discretion to set the parenting plan without amending the language to reflect the additional requests he made at trial.

We find the court considered the necessary factors when determining custody of the child, and after reviewing the evidence, we find it was not an abuse of discretion to order Trevor to remain in the custody of Kubik subject to parenting time with VonRenzell while in Nebraska.

With regard to the period of time dedicated to visits to Nebraska, we find that the court's order was not an abuse of discretion and that it is in Trevor's best interests to apply the terms the parties agreed upon prior to trial, as there is some ambiguity with the trial testimony VonRenzell relies upon. VonRenzell states that because Kubik testified she would agree to 6-week visits, the trial court abused its discretion in only requiring 3-week visits. In making this assertion, VonRenzell refers to Kubik's testimony on direct examination by her attorney:

Q: And you're agreeable with the changes outlined in that letter; is that right?

A: Most of them.

Q: Well, you agree that the -- you would come back to Lincoln two times per year for a period of three months?

A: Yes, that was talked about at the mediation.

VonRenzell refers to this testimony to support his request for 6-week visitation. However, Kubik's response to this question indicates her interpretation of the question was that she agreed to the visitation schedule the parties agreed upon at mediation--two visits for a period of 3 *weeks* each time (as reflected in exhibit 17 and modified in exhibit 19). It is likely Kubik's attorney intended to ask about visits two times per year for a period of 3 weeks, but misspoke and said "months" instead of "weeks," which VonRenzell interpreted to mean two visits for 6 weeks, for a total of 3 months.

Upon review of the evidence, we conclude that the court's determination based upon the best interests of the children and the parenting plan and visitation schedule set in the court's order were not an abuse of discretion.

Change of Surname.

An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court. Where credible evidence is in conflict on a material issue of fact, the appellate court considers and gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of facts rather than another. *In re Change of Name of Slingsby*, 276 Neb. 114, 752 N.W.2d 564 (2008).

In *In re Change of Name of Slingsby*, the Nebraska Supreme Court set forth a list of factors to consider when determining if changing a child's surname is in his or her best interests. These factors include (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as part of a family unit.

Previously, Trevor shared his surname with his mother and stepfather and it did not reflect the name of his biological father. At trial, the court heard evidence from both parties alleging forms of misconduct with regard to Trevor. VonRenzell alleged Kubik intentionally misrepresented the paternity of Trevor and thwarted VonRenzell's efforts to become involved in Trevor's life. Kubik alleged VonRenzell made no effort to support her during her pregnancy and made little effort to support or visit Trevor after his birth. The court considered the wishes of the parties and the evidence presented in determining whether a change should be made to Trevor's last name. The court concluded it was in Trevor's best interests to change his surname to the hyphenated surname, Kubik-VonRenzell.

VonRenzell argues that the change will result in harassment and embarrassment of Trevor because of a hyphenated last name and that it will cause confusion. However, we find the court ordered a name change that would reflect and recognize the involvement of VonRenzell in Trevor's life as well as identify the family unit to which he belongs. Any harassment will likely be offset by the benefits of Trevor's being identified with both biological parents and of establishing an additional association with VonRenzell, who lives quite a distance away. It was not an abuse of discretion for the trial court to order a change of Trevor's surname.

CONCLUSION

We find the trial court did not err in awarding custody to Kubik and in granting permission for her to remove Trevor to Washington. Further, we find the trial court did not err in the establishment of the parenting plan and in ordering a change of Trevor's surname to reflect the last names of both biological parents.

AFFIRMED.